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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954.

No. 599.

JOHN C. SHAFFER,
Petitioner,

v.

SEAS SHIPPING COMPANY, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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STATEMENT OF THE CASE.

The present case is before the Court on the Petition of John C. Shaffer, who was the original Plaintiff in an action instituted in the U. S. District Court for the Eastern District of Pennsylvania. The suit sounded in tort under the Jones Act, 46 U. S. C. A. 688. Shaffer claimed two injuries in the course of his employment on board the Respondent's vessel. At the trial the jury awarded him damages for the second injury and no appeal was taken. The Respondent's obligation to pay maintenance under the general maritime law was not disputed.

The first injury in point of time is the subject matter of this litigation. The defense was that the Petitioner had been injured on this occasion during a scuffle in a bar ashore in a foreign port.

On his own behalf the Petitioner testified that the injury in question had been received due to a defective door on the Respondent's ship. In cross-examination he was confronted with numerous self-contradictions in which he stated orally and in writing that the injury had in fact been sustained in a scuffle in a bar ashore and not in the course of his employment on the Respondent's vessel.

Eyewitnesses to the scuffle in the bar testified, a written statement signed by Shaffer was introduced into the evidence, and the Respondent cross-examined the Petitioner relative to a history given at the time the Petitioner first applied for treatment at the United States Public Health Service Hospital in Baltimore, Maryland. In the handwriting of the admitting physician appeared the following statement:

> "Pt. (patient) is a 27 yr. old Wh. A. S. (American Seaman) fell on 24 April, 1951 and injured his rt. shoulder. Pt. (patient) was scuffling at the time—and fell back, striking his Rt. joint (?) shoulder . . .".

It is about this excerpt from the hospital record which this case now revolves.

At the trial the record was identified while the Plaintiff was testifying under cross-examination and he testified with respect to it. However, when the record was actually offered into evidence, the Trial Judge (Kirkpatrick, J.) sustained the Plaintiff's objection to its admissibility. Later, when the jury retired to deliberate, the Court permitted the jury to take the hospital record and retain possession of it while it deliberated. The Court did, however, instruct the jury not to consider that portion of the hospital record which referred to the history of present illness given by the Plaintiff when he applied for treatment of it.

The jury was given special interrogatories and specifically found that the injury in question occurred in the Palace Cafe and not on board the Defendant's vessel. It found in favor of the Plaintiff as to the second accident and made an award to him for that.

On the Plaintiff's Motion for a new trial the District Judge conceded that if the hospital record was inadmissible it was error to have permitted the jury to have physical custody of it even under cautionary instructions and that a new trial would have to be granted if the jury had possession of an inadmissible exhibit. In a careful opinion, however, the District Court held that the record was admissible under the Federal Business Records Act, 28 U. S. C. A. 1732; that there was no error harmful to the Plaintiff and entered judgment on the verdict of the jury.

The Plaintiff appealed to the Court of Appeals which affirmed the Trial Judge in his holding that the hospital record was admissible. That Court indicated, however, that if evidence incorrectly ruled not admissible at trial had nevertheless gone out with the jury, the Plaintiff might have been prejudiced if the hospital record had raised some new issue which the Plaintiff had not had an opportunity to answer while evidence was being presented.

It therefore examined the entire record and concluded (Slip Opinion, p. 3) that the entire question of the place of injury had been gone into with what it termed "tedious thoroughness", that in view of this the argument advanced by the Plaintiff lacked "the tone of reality", and it therefore affirmed the judgment of the District Court.

This Petition followed.

ARGUMENT.

The Court of Appeals stated that the position taken by the Petitioner there "lacked the tone of reality". We must confess that we can add little to that statement. The Petitioner seems to argue an abstract point which is not present in his case. Some of the statements should not go unchallenged.

Petitioner argues (Petition, p. 5) that the Respondent did not challenge the ruling of the Trial Judge excluding the hospital record from evidence "either in the District Court or in the Court below". Taken out of context, the statement is correct. A party which offers documents into evidence which are excluded has no means of later attacking that ruling if the verdict is in his favor. That is the situation here. Nothing we know of in the rules provides for the review of a question decided adversely to the party which ultimately wins the litigation.

Neither the Court of Appeals nor this Respondent raises any "preponderance of the evidence theory" as Petitioner suggests (Petition, p. 6). The Petitioner does not suggest that the hospital record which the jury took with it was inadmissible as evidence. *Pollack v. Metropolitan Life Insurance Co.*, 138 F. 2d 123; *Tucker v. Loew's Theatre & Realty Corporation*, 149 F. 2d 677; *Norwood v. Great American Indemnity Co.*, 146 F. 2d 797. The history which the hospital record showed had been given by the Petitioner when he applied for medical treatment was a self-contradiction when compared with his testimony from the witness stand. It was an admission by a *party* who had been a *witness* on his own behalf. It was thus admissible. *Wigmore on Evidence, Third Edition*, § 1048b.

Petitioner's complaint is that this erroneous ruling became the law of the case and he thus creates his own dragon so as to raise what he terms a "due process" question. At best, it is error *in vacuo*. This is so because the

question of the place of injury, which was the matter alluded to in the hospital report, was fully explored and argued in extenso to the jury. There is not even a remote possibility that the Petitioner was lulled into a false sense of security by the erroneous ruling of the Trial Judge and thus failed to present any evidence which he might have had bearing upon the question of whether the Petitioner's injury occurred in the course of his employment on board ship or in the Palace Cafe as the jury found.

The Record amply supports the conclusion of the Court of Appeals that there was a thorough airing of the question of the locus of injury and that no constitutional right of the Petitioner was infringed in any way.

CONCLUSION.

There is nothing in the case which merits decision by this Court. Petition should be denied.

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